

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

AARGON AGENCY, INC., *et al.*,

Case No. 2:21-cv-01202-RFB-BNW

Plaintiffs,

ORDER

V.

SANDY O'LAUGHLIN,

Defendant.

I. INTRODUCTION

Before the Court are Plaintiffs' Motion for Temporary Restraining Order, ECF No. 4; Plaintiffs' Motion for Preliminary Injunction, ECF No. 5; Defendant's Motion to Strike, ECF No. 43; Plaintiffs' Motion for Leave to Amend/Correct Complaint, ECF No. 52; and Plaintiffs' Motion for Leave to Supplement and Amend Application for Temporary Restraining Order and Motion for Preliminary Injunction, ECF No. 53.

For the reasons stated below, Defendant's Motion to Strike [ECF No. 43] is DENIED; Plaintiffs' Motion for Leave to Amend/Correct Complaint [ECF No. 52] is GRANTED; Plaintiffs' Motion for Leave to Supplement and Amend Application for Temporary Restraining Order and Motion for Preliminary Injunction [ECF No. 53] is GRANTED; and Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction [ECF Nos. 4, 5] are DENIED.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 The Court makes the following findings based upon the record. In 2021, in response to the
 3 devastating economic toll wrought by the COVID-19 pandemic, the Nevada Legislature enacted
 4 Senate Bill 248 (“SB 248”). The stated purpose of SB 248 is to provide 60-days-notice to medical
 5 debtors that their medical debt has been handed over to a collection agency, so that they may take
 6 measures to verify the debt and consider their options before debt collection begins. SB 248, which
 7 amends Chapter 649 of the Nevada Revised Statutes (“NRS”), was signed into law on June 2,
 8 2021.

9 SB 248 contains three sections relevant to the instant matter:

10 Section 7 of SB 248 requires that a collection agency provide 60-days written notice to a
 11 debtor, via registered or certified mail, “before taking any action to collect a medical debt . . .”
 12 SB 248, § 7(1). Section 7 also mandates that certain information be included in the notice,
 13 including: the name of the healthcare provider that provided the goods or services for which the
 14 debt is owed; the date on which goods and services were provided; the principal amount of medical
 15 debt; the name of the collection agency; and whether the medical debt has been assigned to the
 16 agency for collection, or whether the agency has otherwise obtained the debt for collection. *Id.* at
 17 § 7(1)-(2).

18 Section 7.5 of SB 248 describes the circumstances under which a collection agency may
 19 take a voluntary payment within the 60-day notice period. *Id.* at § 7.5(1). First, the medical debtor
 20 must have initiated contact with the collection agency during the 60-day period. *Id.* at § 7.5(1)(a).
 21 Further, the collection agency must disclose to the medical debtor that a payment is not demanded
 22 or due, and that the debt will not be reported to any credit reporting agency (“CRA”) during the
 23 60-day notice period. *Id.* at § 7.5(1)(b)(1)-(2). Section 7.5 also provides that no action taken by a
 24 medical debtor to initiate contact with a collection agency may be construed as a waiver of the 60-
 25 day notice period. *Id.* at § 7.5(2). Finally, Section 7.5 offers certain legal protections to medical
 26 debtors who make voluntary payments in the 60-day period.¹ See *id.* at § 7.5(3)(a)-(c).

27 1 § 7.5(3) states that any payment made towards a medical debt within the 60-day period “(a) Does
 28 not extend the applicable statute of limitations; (b) Is not an admission of liability; and (c) Shall

1 Section 8 of SB 248 prohibits collection agencies and their managers, agents, and/or
 2 employees from obtaining confessions of judgment for medical debt, and from appearing for a
 3 debtor in a judicial proceeding. Id. at § 8(1). It further prohibits those persons and entities from
 4 initiating a civil action to collect medical debt “if the amount of the medical debt, excluding
 5 interest, late fees, collection costs, attorney’s fees and any other fees or costs, is less than the
 6 maximum jurisdictional amount” set forth in NRS 37.010. Id. at § 8(2). Finally, Section 8 limits
 7 attorney’s fees and collection fees to 5 percent of the medical debt itself, exclusive of interest,
 8 costs, and fees. Id. at § 8(3).

9 On June 25, 2021, Plaintiffs filed a Complaint, alleging that SB 248 is unconstitutional and
 10 preempted by federal law. ECF No. 1. Plaintiffs are trade groups, collections agencies, and licensed
 11 debt collectors that engage in consumer debt collection and credit reporting on behalf of their
 12 clients. Plaintiffs sue Defendant Sandy O’Laughlin in her official capacity as Commissioner of the
 13 State of Nevada’s Department of Business and Industry, Financial Institutions Division (“FID”),
 14 as the Commissioner is empowered to enforce SB 248 under Chapter 649 of the NRS. See NRS §
 15 649.051. In this facial challenge to SB 248, Plaintiffs argue that the law (1) is unconstitutionally
 16 vague; (2) conflicts with the Fair Debt Collection Practices Act (“FDCPA”); (3) is preempted by
 17 the Fair Credit Reporting Act (“FCRA”); (4) is an unconstitutional prior restraint on speech; and
 18 (5) violates the Equal Protection Clause of the Fourteenth Amendment.

19 On June 28, 2021, Plaintiffs filed a Motion for TRO (“TRO”) and Motion for Preliminary
 20 Injunction (“PI”). ECF Nos. 4, 5. Plaintiffs argue that in the absence of an injunction enjoining
 21 enforcement of SB 248, they face irreparable harm, because enforcement would deprive Plaintiffs
 22 of their constitutional rights; force them to choose between compliance with state law and federal
 23 law; and expose them to liability for monetary damages, fees, and costs. Defendant responded to
 24 the Motion for TRO and Motion for PI on July 13, 2021. ECF No. 23. Plaintiffs replied on July
 25 20, 2021. ECF No. 25.

26 The Court held two hearings on Plaintiffs’ Motion for TRO and Motion for PI, on July 27,

27
 28 not be construed as a waiver of any defense to the collection of medical debt.”

1 2021, and on August 16, 2021. ECF Nos. 29, 37. On August 10, 2021, per the Court's instruction,
 2 Defendant filed a Notice of Intent to Promulgate Regulations. ECF No. 31. Defendant's Notice
 3 provided a general timeline for the implementation of anticipated regulations. Id. Plaintiffs filed a
 4 Response to Defendant's Notice the next day. ECF No. 32. On August 29, 2021, Plaintiffs filed a
 5 Supplement to their Motion for PI and Motion for TRO. ECF No. 40. On September 7, 2021,
 6 Defendant filed a Motion to Strike the Response (ECF No. 32) and the Supplement (ECF No. 40).
 7 ECF No. 43.

8 On November 30, 2021, Plaintiffs filed a Motion to Amend/Correct the Complaint, and a
 9 Motion to Amend/Correct the Motion for PI and Motion for TRO. ECF Nos. 52, 53. Defendant
 10 responded to both motions on December 14, 2021. ECF Nos. 54, 55. Plaintiffs filed a Reply to the
 11 Motion to Amend/Correct the Complaint on December 21, 2021, ECF No. 56, and a Reply to the
 12 Motion to Amend/Correct the Motion for PI and Motion for TRO on December 28, 2021. ECF
 13 No. 59.

14 This Order follows.

15

16 **III. DEFENDANT'S MOTION TO STRIKE [ECF No. 43]**

17 At the July 27 hearing on Plaintiffs' Motion for TRO and Motion for PI, the Court
 18 instructed Defendant to file a supplement advising the Court if the FID intended to promulgate any
 19 regulations regarding SB 248, and if so, a timeline with specific deadlines for issuance of those
 20 regulations. See ECF No. 30. Defendant subsequently filed a Notice of Intent to Promulgate
 21 Regulations, setting forth the following timeline:

22

- 23 • Draft regulations to be completed by August 24, 2021.
- 24 • Small business impact survey to be sent by September 7, 2021.
- 25 • Small business impact survey responses due by September 17, 2021.
- 26 • FID to complete small business impact statement, based on comments received, by
 October 8, 2021.
- 27 • FID conducts a workshop on draft regulations, to be completed by October 26, 2021
 (should a second workshop be necessary, it will occur by November 24, 2021).

- 1 • Draft regulations sent to the Nevada Legislative Counsel Bureau (the “Bureau”) for
2 their review – a process which can take between 30 to 60 days.
- 3 • Once the Bureau returns the draft regulations to FID, FID will publish public notice
4 of an adoption hearing with 30 days notice – at the latest, by December 24, 2021
- 5 • If the regulations are adopted by the FID, the regulations are sent to the Nevada
6 Legislative Commission (“Commission”) for its review. If the Commission approves
7 the regulations adopted by the FID, they shall be “promptly” filed with the Nevada
8 Secretary of State, NRS 233B.067(5).

9 On August 11, 2021, Plaintiffs filed a Response to Defendant’s Notice, arguing that based
10 on the review and approval process set forth in Defendant’s notice, regulations will not be finalized
11 until January 2022, and are more likely to be completed by 2023. ECF No. 32. On August 29,
12 2021, Plaintiffs filed a supplemental response (“Supplement”) to Defendant’s Notice. ECF No. 40.
13 Plaintiffs seek to supplement the record with the draft proposed regulations issued by the FID on
14 August 24, 2021. ECF No. 40. Plaintiffs allege that the proposed draft regulations do not remedy
15 any of the alleged conflicts between SB 248 and the FDCPA and FCRA, and thus the Court should
16 immediately enter injunctive relief to enjoin enforcement of SB 248. Defendant then filed a Motion
17 to Strike the Response and the Supplement. ECF No. 43.

18 For the reasons stated below, the Motion to Strike is DENIED.

19 **a. Legal Standard**

20 Local Rule 7-2 provides that a party “may not file supplemental . . . briefs, authorities, or
21 evidence without leave of court granted for good cause,” and may “strike supplemental filings
22 made without leave of the court.” LR 7-2(g).

23 District courts have inherent power to control their own dockets, including the power “to
24 determine what appears in the court’s records” and to strike items from the docket to address
25 conduct that is improper but does not warrant dismissal. Ready Transp., Inc. v. AAR Mfg., Inc.,
26 627 F.3d 402, 404-05 (9th Cir. 2010). Whether to grant a motion to strike lies within the discretion
27 of the district court. Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010);
28 Novva Ausrustung Grp., Inc. v. Kajioka, No. 2:17-cv-01293-RFB-VCF, 2017 U.S. Dist. LEXIS

1 108614, at *5-6 (D. Nev. July 13, 2017).

2 **b. Analysis**

3 Defendant argues that the Court should strike Plaintiffs' Response and Supplement, ECF
 4 Nos. 32, 40, because they were filed without leave of the Court in violation of Local Rule 7-2(g).
 5 Defendant contends that Plaintiffs' Response and Supplement are improper surreplies filed in
 6 support of Plaintiffs' Motion for PI and Motion for TRO.

7 Plaintiffs counter that this is not a case where an improper surreply has been filed in an
 8 attempt to gain a procedural advantage in briefing. With respect to the Supplement, Plaintiffs
 9 emphasize that the FID issued proposed draft regulations only after briefing had closed and the
 10 Court's August 16 evidentiary hearing had concluded. Plaintiffs argue that they had no control
 11 over the FID's timeline with respect to the proposed draft regulations, and that Local Rule 7-2(g)
 12 thus does not prohibit Plaintiffs' responses to the FID's notice.

13 The Court denies Defendant's Motion to Strike. One of the key issues discussed at the July
 14 27 hearing pertained to what regulations might be promulgated to clarify the scope of SB 248, and
 15 the timeline for the issuance of any such regulations. The Court notes that Plaintiffs could not have
 16 substantively responded to the projected timeline prior to the close of briefing on their motions for
 17 TRO and PI, because of the timing of the issuance of the proposed draft regulations. Further, the
 18 Court finds it appropriate for Plaintiffs to have brought the issuance of the Draft Regulations to
 19 the Court's attention, given that the Court expressed an interest in the subject at oral argument on
 20 July 27. The Court also finds that Plaintiffs' supplemental briefs are appropriately narrow, cabined
 21 only to the discrete issue of whether any proposed regulations by the FID may cure the alleged
 22 constitutional infirmities raised by Plaintiffs.

23 The Court accordingly DENIES Defendant's Motion to Strike, ECF No. 43.

24

25 **IV. PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT [ECF No. 52]
 26 AND MOTION FOR LEAVE TO SUPPLEMENT AND AMEND MOTION FOR TRO AND
 27 MOTION FOR PI [ECF No. 53]**

28 Plaintiffs move for leave to amend the Complaint. ECF No. 52. Plaintiffs also move the for
 leave to supplement their Motion for TRO and Motion for PI. ECF No. 53.

1 Plaintiffs seek to amend their Complaint to add two arguments to their existing claim that
 2 SB 248 is preempted by the FDCPA: (1) that SB 248's certified mail requirement is in conflict
 3 with the FDCPA's prohibition on creating a "false sense of urgency" to debtors; and (2) that debt
 4 collectors cannot simultaneously comply with SB 248 and a recent regulation promulgated by the
 5 Consumer Financial Protection Bureau ("CFPB") – "Regulation F" – which imposes additional
 6 requirements on debt collectors under the FDCPA. Plaintiffs seek to supplement their Motion for
 7 TRO and Motion for PI with their argument pertaining to Regulation F. They also seek to
 8 supplement the TRO and PI motions with the declarations of Richard Bennett and Tim Myers,
 9 which purportedly speak to the "devastating impact SB 428 is having on licensed debt collectors
 10 nearly five full months after the law has taken effect, including the pending closure of one licensee,
 11 and the halting of all new medical debt collection in Nevada"

12 For the reasons stated below, both motions to amend are GRANTED.

13 **a. Legal Standard**

14 "[A] party may amend its pleading only with the opposing party's written consent or the
 15 court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).
 16 A motion to amend "is to be liberally granted where from the underlying facts or circumstances,
 17 the plaintiff may be able to state a claim." DCD Programs, Ltd. V. Leighton, 833 F.2d 183, 186
 18 (9th Cir. 1987). Further, "[o]n motion and reasonable notice, the court may, on just terms, permit
 19 a party to serve a supplemental pleading setting out any transaction, occurrence, or event that
 20 happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). "District courts
 21 have broad discretion to allow supplemental pleadings." Fremont Inv. & Loan v. Singleton, No.
 22 2:03-cv-1406-PMP-RJJ, 2007 U.S. Dist. LEXIS 30234, at *19 (D. Nev. April 20, 2007) (citing
 23 Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988)).

24 When considering whether to grant a motion seeking leave to amend a complaint, the Court
 25 may consider whether there is (1) bad faith; (2) undue delay; (3) prejudice to the opposing party;
 26 (4) futility in amendment; and (5) whether the Plaintiff has previously amended the complaint.
 27 Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). Leave to amend should be denied
 28 if the proposed amendment is futile. Carrico v. City & Cty. of San Francisco, 656 F.3d 1002, 1008

1 (9th Cir. 2011).

2 Supplementation of the existing record is prohibited without leave of the court. LR 7-2(g).
 3 “A party may not file supplemental pleadings, briefs, authorities, or evidence without leave of
 4 court granted for good cause.” *Id.*

5 **b. Analysis**

6 *I. Motion for Leave to File Amended Complaint [ECF No. 52]*

7 First, Plaintiffs seek to amend their Complaint to add the argument that SB 248’s certified
 8 mail requirement cannot coexist with the FDCPA, because under Trans World Accounts, Inc. v.
 9 FTC, 594 F.2d 212, 215 (9th Cir. 1979), debt collectors may not send materials to debtors that
 10 misrepresent the import or urgency of a communication, which certified mail would allegedly do.
 11 Second, Plaintiffs seek to add the argument that debt collectors cannot simultaneously comply
 12 with SB 248 and Regulation F. Regulation F, codified on November 30, 2021 at 12 C.F.R. § 1006,
 13 creates a model validation notice and provides a safe harbor to debtors who send the model notice.
 14 Plaintiffs argue SB 248 requires debt collectors to send a completely different notice, and thus if a
 15 debt collector complies with SB 248, they will lose Regulation F’s safe harbor.

16 Defendant argues that amendment of the Complaint is improper because the allegations
 17 that Plaintiffs seek to add could not withstand a motion to dismiss, and thus the futility doctrine
 18 bars amendment. Defendant argues that SB 248’s certified mail requirement does not create a false
 19 sense of urgency to debtors, in violation of Trans World. Defendant argues that in Trans World,
 20 the Ninth Circuit held that a debt collection agency’s letter formats were deceptive in violation of
 21 the Federal Trade Commission Act (the FDCPA’s predecessor) because they were made to look
 22 like Western Union Telegrams and threatened imminent legal action; here, by contrast, the
 23 certified mail requirement of SB 248 does not – by its format or purpose – denote urgency, such
 24 that it would be in conflict with the FDCPA. Further, Defendant contends that there is no tension
 25 between Regulation F and SB 248’s certified mail requirement, because SB 248’s 60-day notice
 26 applies *prior* to any action to collect a medical debt, whereas Regulation F’s model validation
 27 notice is only given once a debt collection starts.

28 Defendant also points to the FDCPA’s savings clause, which provides that a state law “is

1 not inconsistent" with the FDCPA "if the protection such law affords any consumer is greater than
2 the protection provided by this subchapter." 15 U.S.C. § 1692n. Because SB 248 provides greater
3 protection to medical debtors in Nevada than the FDCPA, Defendant argues, any FDCPA
4 preemption argument lacks merit, and thus Plaintiffs' efforts to expand their FDCPA preemption
5 claim are futile and should be rejected.

6 The Court does not find that the futility doctrine bars amendment here. A proposed
7 amendment is futile if it cannot withstand a Rule 12(b)(6) motion for failure to state a claim. Miller
8 v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). The Court finds that both of Plaintiffs'
9 proposed new arguments with respect to FDCPA preemption have satisfied the requirement of a
10 "short and plain statement of the claim showing that the pleader is entitled to relief," taking all
11 "well-pleaded allegations of material fact in the complaint . . . as true" and "constru[ing] [them] in
12 the light most favorable" to Plaintiffs. Fed. R. Civ. P. 8(a)(2); Faulkner v. ADT Sec. Services, Inc.,
13 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted). Further, there is no indication that the
14 amendment is sought in bad faith, or that there is undue delay or prejudice to Defendant. The Court
15 notes that this is Plaintiffs' first attempt to amend the Complaint, and that it was timely brought
16 once Plaintiffs learned of Regulation F.

17 As such, Plaintiffs' Motion for Leave to File Amended Complaint is GRANTED, and the
18 Proposed First Amended Complaint [ECF No. 52-1] shall serve as the operative complaint for the
19 purposes of this Order.

22 Next, Plaintiffs seek to supplement their Motion for TRO and Motion for PI with their
23 argument pertaining to Regulation F, as well as with the supplemental declarations of Richard
24 Bennett and Tim Myers. Bennett is the President of PlusFour, Inc. – one of the individual Plaintiffs
25 in this matter – and his declaration states that PlusFour is at risk of shuttering due to uncertainties
26 regarding how to comply with SB 248 and federal statute simultaneously. Bennett attests that since
27 SB 248 was enacted, the medical debt collection industry has “come to a halt,” and that PlusFour
28 has been forced to lay off its entire staff. Myers is the President of the Nevada Collectors

1 Association (“NCA”), a trade association whose members consist of collections agencies, law
 2 firms, and asset buying companies engaged in the collection of medical debt. Myers’ declaration
 3 states that because SB 248 “forces debt collectors to choose between complying with state law at
 4 the expense of complying with federal law,” his members have stopped engaging in medical debt
 5 collection, creating an “industry-wide standstill in medical debt collection.”

6 Defendant raises many of the same arguments regarding preemption in opposition to
 7 Plaintiffs’ motion to supplement their TRO/PI applications with additional information about
 8 Regulation F. With respect to the supplemental declarations, Defendant argues that economic harm
 9 is not irreparable harm – thus, to the extent the declarations of Bennett and Myers speak to the risk
 10 of individual debt collectors experiencing financial loss as a result of SB 248, the Court should not
 11 consider these affidavits.

12 The Court finds that good cause exists to support supplementation of the record. The Court
 13 having permitted Plaintiffs to amend their Complaint to include argument pertaining to Regulation
 14 F, it also finds it appropriate to permit Plaintiffs to argue that Regulation F conflicts with SB 248
 15 for the purposes of requesting a TRO or PI. The Court again acknowledges that Plaintiffs timely
 16 sought leave to supplement the record with Regulation F, given that the federal regulatory
 17 landscape has developed since the time Plaintiffs filed the initial Complaint and motions for
 18 injunctive relief. This justifies the filing of Plaintiffs’ proposed supplemental material.

19 Further, while it is true that pure economic harm does not constitute irreparable harm for
 20 the purposes of evaluating a TRO or a PI, “[t]he threat of being driven out of business is sufficient
 21 to establish irreparable harm.” Am. Passage Media Corp. v. Cass Communications, Inc., 750 F.2d
 22 1470, 1474 (9th Cir. 1985). Both Bennett’s and Myers’ declarations attest that there is a risk of
 23 both business and industry collapse, and thus may support Plaintiffs’ Motion for TRO and Motion
 24 for PI.

25 Plaintiff’s Motion for Leave to Supplement the Motion for TRO and Motion for PI is
 26 therefore GRANTED, and the Court shall consider the attached exhibits in evaluating the Motion
 27 for TRO [ECF No. 4] and Motion for PI [ECF No. 5].

28

V. PLAINTIFFS' MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION [ECF NOS. 4, 5]

Plaintiffs argue that SB 248 is unenforceable, unconstitutional, and preempted by federal law, and that an injunction is required to prevent irreparable harm. In this facial challenge to SB 248, Plaintiffs contend that SB 248 (1) is unconstitutionally vague; (2) conflicts with the Fair Debt Collection Practices Act (“FDCPA”); (3) is preempted by the Fair Credit Reporting Act (“FCRA”); and (4) is an unconstitutional prior restraint on speech.

For the reasons stated below, Plaintiffs' Motions for TRO and PI, as supplemented by ECF No. 53, are DENIED.

a. Legal Standard

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements: “(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tip in its favor, and (4) that the public interest favors an injunction.” Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014) (citing Winter, 555 U.S. 7, 20 (2008)).

A preliminary injunction may also issue under the “serious questions” test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a preliminary injunction by demonstrating “that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” in addition to the other Winter elements. Id. at 1134-35 (citation omitted).

The analysis for a temporary restraining order is “substantially identical” to that of a preliminary injunction. Stuhlbarg Intern. Sales Co, Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

b. Analysis

L. Likelihood of Success on the Merits

A) Vagueness

First, Plaintiffs argue they are likely to succeed on the merits of their claim that SB 248 is unconstitutionally vague. Plaintiffs argue that Sections 7, 7.5, and 8 of SB 248 are all unconstitutionally vague.

“A law is void for vagueness ‘if it is impermissibly vague in all of its applications.’” United States v. Makowski, 120 F.3d 1078, 1080 (9th Cir. 1997) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)). A statute is also void for vagueness “when it does not sufficiently identify the conduct that is prohibited.” Id. To satisfy due process, a statute must be “sufficiently clear so as not to cause persons ‘of common intelligence . . . necessarily [to] guess at its meaning and ‘to differ as to its application.’” Id. (quoting United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1995)). To mount a successful facial challenge to a statute for vagueness, a plaintiff must establish “that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications.” Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (internal quotations omitted). “[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid ‘in the vast majority of its intended applications.’” Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1021 (9th Cir. 2010) (quoting Hill v. Colorado, 530 U.S. 703, 733 (2000)). Further, where otherwise imprecise terms are “used in combination with terms that provide sufficient clarity,” vagueness problems may be avoided. Id.

Plaintiffs first contend that Section 7 is unconstitutionally vague because it fails to define key terms. For instance, while Section 7(1) forbids “taking any action to collect a medical debt” for 60 days after sending the required notice, it does not specify whether an “action” is merely a civil legal action, or some broader category of conduct. Plaintiffs also allege it is silent as to what a collector may or may not do if the notice is returned as undeliverable. Plaintiffs also argue that Section 7 is unconstitutionally vague because it conflicts with NRS § 649.332, which provides that “when collecting a debt on behalf of a hospital, within 5 days after the initial communication with the debtor in connection with the collection of the debt, the collection agency shall . . . send a written notice to the debtor.”

1 With respect to Section 7.5, Plaintiffs argue the section is unconstitutionally vague because
 2 it (1) fails to address whether voluntary payments may be accepted from third parties acting on
 3 behalf of the debtor; (2) requires disclosure that payment is not “demanded or due,” but does not
 4 state whether this requirement applies when a voluntary payment is initiated by mail prior to the
 5 collector having the opportunity to make the relevant disclosure; and (3) contradicts Section 7
 6 insofar as it requires a statement that a debt is “not demanded or due,” while Section 7 requires the
 7 60-day notice to identify the medical goods and/or services provided for which the debt is owed.

8 Finally, Plaintiffs broadly argue that Section 8 is vague because it does not indicate whether
 9 attorneys fall within the ambit of SB 248. Plaintiffs note that previously, attorneys have not been
 10 required to obtain a Chapter 649 license and have never been subject to the authority of the
 11 Commissioner under Chapter 649, but because Section 8 speaks to debt collectors and their
 12 “agents,” attorneys (who are agents of their clients under state law) may now be subject to Chapter
 13 649’s provisions.

14 Defendant argues the relevant sections of SB 248 are not unconstitutionally vague. With
 15 respect to Section 7, Defendant notes that Plaintiffs are highly sophisticated collection companies,
 16 and it should be patently clear to them from the terms of SB 248 that “any action to collect medical
 17 debt” refers to *any and all action*. Defendant emphasizes that NRS § 649.020 defines Plaintiff
 18 collection agencies as persons engaged in the business of “obtaining in any manner the payment
 19 of a claim owed or due.” As such, Plaintiffs’ claim that the law is vague for failure to more
 20 specifically define the term “action,” in this context, is baseless. Further, if the notice is returned
 21 undeliverable, Plaintiffs will not be liable, as their only obligation under Section 7 is to send the
 22 notice. Finally, Defendant argues there is no conflict with NRS § 649.332, because that provision
 23 deals with what debt collectors must do when they begin collecting debt, whereas SB 248 pertains
 24 to what debt collectors must do *before* taking action.

25 Defendant also rejects Plaintiffs’ vagueness arguments about Section 7.5. Defendant
 26 argues it is plainly obvious that payments made on behalf of a debtor can be accepted, as nowhere
 27 in Section 7.5 is such acceptance discouraged. Defendant also notes that if a voluntary payment is
 28 made by mail prior to issuance of the notice, a debt collector may nevertheless advise the debtor

1 of their rights prior to *acceptance* of the payment. Finally, Defendant argues there is no
 2 contradiction between Section 7 and Section 7.5, because collection agencies may simultaneously
 3 identify under Section 7 the goods and services for which the debt is owed, and *also* state – in
 4 accordance with Section 7.5 – that the debt is not yet demanded or due.

5 Finally, Defendant urges this Court to reject Plaintiffs' challenge to Section 8. Defendant
 6 notes that attorneys were previously exempt from NRS Chapter 649's provisions only insofar as
 7 their actions did not mimic those of a collection agency. As such, nothing has changed about the
 8 status quo of Chapter 649 – so long as attorneys do not engage in the conduct prohibited by SB
 9 248 as a collection agent, the law does not apply to them.

10 The Court finds that Plaintiffs are unlikely to succeed on the merits of their claim that SB
 11 248 is unconstitutionally vague. As a preliminary matter, the Court recognizes that “the degree of
 12 vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment,” and
 13 that economic regulations like SB 248 are subject “to a less strict vagueness test because its subject
 14 matter is often more narrow, and because businesses . . . can be expected to consult relevant
 15 legislation in advance of action.” Hoffman Estates, 455 U.S. at 498. Further, “the regulated
 16 enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by
 17 resort to an administrative process.” Id. Indeed, in this case, Plaintiffs have represented to the Court
 18 that they have sought clarification from Defendant, and Defendant has also indicated that the FID
 19 is in the process of promulgating regulations to clarify the manner in which SB 248 will be
 20 enforced against the medical debt collection industry.

21 Taking each challenged section in turn, the Court first finds that Section 7's failure to more
 22 specifically define key phrases and terms, such as “any action to collect a medical debt,” does not
 23 render Section 7 vague. Interpreting the phrase “any action” in accordance with its plain and
 24 ordinary meaning, see id., it is clear that Section 7 refers to any and all action. Further, reading the
 25 phrase in context with NRS 649.020, the Court infers that the “action” referred to is any conduct
 26 that is related to collecting “in any manner the payment of a claim owed.” See Perez-Guzman v.
 27 Lynch, 835 F.3d 1066, 1074 (9th Cir. 2016) (stating that the court's goal is “to understand the
 28 statute as a symmetrical and coherent regulatory scheme and to fit, if possible, all parts into a

1 harmonious whole” (internal quotations and citations omitted)). Nor does the Court find that
 2 Plaintiffs are likely to succeed on the claim that Section 7 conflicts with NRS § 649.332. NRS
 3 § 649.332(2) sets forth certain communication requirements for debt collectors collecting a debt
 4 on behalf of a hospital, after an initial communication is made to the debtor “in connection with
 5 the collection of the debt.” Section 7 of SB 248, by contrast, explicitly states that the 60-day notice
 6 is due “*before* taking any action to collect a medical debt” – thus, it cannot be said that the notice
 7 is made “in connection with the collection of the debt.” (emphasis added).

8 The Court further finds that Plaintiffs are unlikely to succeed on the merits of their
 9 vagueness arguments pertaining to Section 7.5, largely for the reasons Defendant identifies. Many
 10 of the challenges to Section 7.5 raised by Plaintiffs constitute the type of “specula[tion] about
 11 ‘hypothetical’ or ‘imaginary’ cases that the Supreme Court has cautioned against in mounting a
 12 facial attack on a statute’s constitutionality.” Wash. State Grange, 552 U.S. at 449-50. Nothing in
 13 the language of SB 248 suggests that payments may not be voluntarily made on a debtor’s behalf
 14 by a third party, or that a collection agency cannot provide notice to a debtor who has made a
 15 voluntary payment by mail *before* the agency accepts payment. The Court also finds there to be
 16 no contradiction between Section 7 and Section 7.5, because the language of SB 248 does not
 17 foreclose the possibility that a collection agency may simultaneously identify the medical goods
 18 and services provided for which a debt is owed, and also inform the debtor that the debt not yet
 19 demanded or due.

20 The Court also rejects Plaintiffs’ vagueness challenge to Section 8. NRS Section
 21 649.020(2)(g) states that attorneys are *not* considered collections agencies unless they are
 22 conducting themselves like collection agencies, “so long as they are retained by their clients to
 23 collect or to solicit or obtain payment of such clients’ claims in the usual course of the practice of
 24 their profession.” Section 8(1) makes SB 248 applicable to *collection agencies* and their “agents”
 25 – not lawyers operating in the ordinary course. Thus, even if an attorney is an “agent” of her client
 26 under Nevada law, she would be exempt from SB 248, so long as she complies with the terms of
 27 NRS 649.020(2)(g) and does not work as the agent of a collection agency.

28 Because Plaintiffs have failed to establish that “no set of circumstances exist[] under which

1 [SB 248] would be valid,” the Court finds Plaintiffs are unlikely to succeed on the merits of their
 2 vagueness challenge. Wash. State Grange, 552 U.S. at 449. Further, the Court notes that vagueness
 3 challenges will be rejected when it is clear as a whole what the law prohibits. Brumsickle, 624
 4 F.3d at 1021. Taken as a whole, it is evident that the function of SB 248 is to create a 60-day
 5 breathing period for medical debtors, and to ensure that any voluntary payment made by the debtor
 6 does not extinguish that breathing period or otherwise result in any admission of liability. Given
 7 that SB 248 is being challenged at this pre-enforcement stage, where regulations to clarify SB 248
 8 are forthcoming, the Court declines to deploy the “manifestly strong medicine” – typically used
 9 “sparingly and only as a last resort” – of declaring the statute facially unconstitutional for
 10 vagueness. Bigelow v. Virginia, 421 U.S. 809, 817 (1975) (quoting Broadrick v. Oklahoma, 413
 11 U.S. 601, 613 (1973)).

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B) FDCPA Preemption

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Next, the Court turns to Plaintiffs’ FDCPA preemption argument.

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The Supremacy Clause of the United States Constitution gives Congress “the power to preempt state law,” which may be exercised “either expressly or impliedly.” Arizona v. United States, 567 U.S. 387, 399 (2012). Implied preemption comes in two varieties – field preemption, where Congress has determined an area “must be regulated by its exclusive governance,” and conflict preemption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Id. Congress’s purpose in enacting a statute serves as “the ultimate touchstone in *every pre-emption case*,” and all preemption arguments “must be grounded in the text and structure of the statute at issue.” Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); Kansas v. Garcia, ___ U.S. ___, 140 S. Ct. 791, 804 (2020) (emphasis added). Plaintiffs bear the burden of proving preemption. See Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1526 n.6 (9th Cir. 1995).

Here, to the extent there is any preemption, the parties appear to agree that the type of preemption at issue is conflict preemption. Plaintiffs contend that SB 248 is preempted by the

1 FDCPA, because the terms of SB 248 conflict with execution of the FDCPA in several ways.

2 First, the FDCPA requires a debt collector to send the debtor a notice containing certain
 3 information, within five days after the initial communication with the debtor in connection with
 4 the collection of any debt (the “Validation Notice”). 15 U.S.C. § 1692g(a). This Validation Notice
 5 must include, *inter alia*, the amount of the debt, the name of the creditor to whom the debt is owed,
 6 and a statement that the debt is assumed valid unless the debtor disputes the validity of the debt
 7 within 30 days of receipt of the notice. 15 U.S.C. § 1692g(a)(1)-(3). Plaintiffs contend that this
 8 Validation Notice requirement conflicts with Section 7 of SB 248, which prohibits debt collectors
 9 from taking any action to collect a medical debt for 60 days after sending the debtor the certified
 10 notice letter. Plaintiffs argue that SB 248’s 60-day notice constitutes an “initial communication”
 11 within the meaning of 15 U.S.C. § 1692g(a), and thus a collection agency cannot comply with the
 12 FDCPA’s Validation Notice requirement – including its required statement that the debt is
 13 assumed valid if the debtor fails to contest validity within 30 days – without violating SB 248’s
 14 prohibition on taking further action to collect the debt within the state law’s 60-day breathing
 15 period. Plaintiffs also note that after a debt collector provides the Validation Notice, the FDCPA
 16 permits collection activities and communications to continue under § 1692g(b) – this, they argue,
 17 is in direct conflict with SB 248’s 60-day moratorium on debt collection.

18 Second, the FDCPA prohibits a debt collector from using any “false, deceptive, or
 19 misleading representation or means in connection with the collection of any debt,” including by
 20 making a false representation about the “character, amount, or legal status of any debt.” 15 U.S.C.
 21 § 1692e(2)(a). Plaintiffs argue that Section 7.5 of SB 248, which requires a collection agency to
 22 disclose to the medical debtor that a payment is not demanded or due, despite it being legally owed,
 23 could be considered a “false representation” about the “legal status of any debt,” in violation of
 24 the FDCPA.

25 Third, the FDCPA contains a “mini-Miranda” warning, which requires a debt collector to
 26 disclose in any initial written or oral communication that the debt collector “is attempting to collect
 27 a debt and that any information obtained will be used for that purpose.” 15 U.S.C. § 1692e(11).
 28 Plaintiffs argue that the “mini-Miranda” warning conflicts with SB 248 because it directly

1 contradicts Section 7.5's requirement that debt collectors state that the debt "is not demanded or
 2 due" when a debtor voluntarily initiates payment with the debt collector.

3 In their supplemental briefing, ECF No. 53, Plaintiffs argue that the recently promulgated
 4 Regulation F, 12 C.F.R. § 1006 *et seq.*, proves that a Section 7 notice is an "initial communication"
 5 about a "debt" under the FDCPA. They note that 12 C.F.R. § 1006.34(b)(2) defines "initial
 6 communication" to mean "the first time that, in connection with the collection of a debt, a debt
 7 collector conveys information, directly or indirectly, regarding the debt to the consumer." Plaintiffs
 8 contend that, under this broad definition, a Section 7 notice cannot be anything other than an
 9 "initial communication," because it constitutes the first time that a debt collection agency "conveys
 10 information" to the consumer regarding a debt. Further, because the regulation expressly exempts
 11 certain communication from the definition of an initial communication, such as formal pleadings
 12 in a civil action, but does not exempt notices like Section 7 notices, Plaintiffs argue that SB 248's
 13 Section 7 notice must constitute an "initial communication" for the purposes of the FDCPA.
 14 Finally, Plaintiffs emphasize that collection agencies cannot use the CFPB's model Validation
 15 Notice – which would confer a safe harbor onto those debt collectors who use it – because the
 16 model notice contains several conflicts with SB 248. For example, while the model notice
 17 expressly states that the debt collector "is trying to collect a debt," Section 7 of SB 248 prohibits
 18 debt collectors from demanding payment. Further, while the model notice gives the debtor a
 19 deadline to dispute the debt, SB 248 prohibits the imposition of such a deadline. Plaintiffs contend
 20 that these conflicts, along with several others, make it such that debt collectors must abandon the
 21 model notice (and its safe harbor) in order to comply with SB 248.

22 Defendant responds that SB 248 is not in conflict with – but rather, is complimentary to –
 23 the FDCPA. The linchpin of Defendant's argument is that SB 248 is triggered *before* a collection
 24 agency takes *any* action to collect a medical debt, where, by contrast, the FDCPA is triggered *upon*
 25 *collection* of a medical debt. Thus, Defendant argues, Section 7 of SB 248 does not prohibit
 26 collection agencies from providing the "mini-Miranda" notice, as this notice is required only once
 27 an initial communication is taken to induce payment of a medical debt. For the same reason,
 28 Section 7.5 is not in conflict with the FDCPA's Validation Notice, 15 U.S.C. § 1692g(a), or the

1 FDCPA's prohibition on false representations, 15 U.S.C. § 1692e(2)(a), as both of those
 2 protections under the FDCPA are only triggered once a collection agency begins taking actions to
 3 induce payment of a debt. In other words, the FDCPA simply is not applicable during SB 248's
 4 60-day notice period. Defendant contends that any attempt by Plaintiffs to expand the definition
 5 of an "initial communication" based on Regulation F is misguided, as Regulation F merely
 6 implements the provisions of the FDCPA.

7 Further, Defendant emphasizes that the FDCPA contains a savings clause that provides
 8 that state law is only inconsistent with the FDCPA if it undermines consumer protection. Thus,
 9 any state law that affords consumer protection greater than that offered by the FDCPA is expressly
 10 *not* preempted by the federal statute. Defendant argues that Plaintiffs fail to explain how SB 248
 11 undermines any consumer protection policy in the FDCPA.

12 The Court's analysis begins with the presumption against preemption, "rooted in respect
 13 for the States as independent sovereigns in our federal system," and the assumption "that Congress
 14 does not cavalierly preempt state laws." Tarrant Reg'l Water Dist. v. Hermann, 569 U.S. 614, 631
 15 n.10 (2013). With this presumption in mind, the Court does not find a likelihood of success on the
 16 merits with respect to Plaintiffs' FDCPA preemption argument, because it is not impossible to
 17 comply with both SB 248 and the FDCPA simultaneously. Id. By the FDCPA's plain language,
 18 Altria Grp, 555 U.S. at 76, both the Validation Notice requirement and the "mini-Miranda"
 19 requirement are triggered by a communication made "in connection with the collection of any
 20 debt." See 15 U.S.C. § 1692g(a); § 1692e(11). The Validation Notice requirement is also
 21 specifically triggered five days after the "initial communication," made "in connection with the
 22 collection of any debt." Simply put, a Section 7 notice is not a communication made "in connection
 23 with the collection of any debt," because Section 7(1) *explicitly states* that the notice must be given
 24 60 days "*before* taking any action to collect a medical debt." (emphasis added). In other words,
 25 the Section 7 notice cannot be a communication (initial or otherwise) *made in connection with* debt
 26 collection, because Section 7 expressly provides that the notice is made *before* any steps to initiate
 27 the debt collection process have occurred.

28 The issue is not so much with the FDCPA's definition of "initial communication," then, as

1 it is with the phrase “made in connection with the collection of any debt.” The Court finds support
 2 for this plain language interpretation of the statute in the Ninth Circuit’s decision in Hernandez v.
 3 Williams, 829 F.3d 1068 (9th Cir. 2016). In Hernandez, the Ninth Circuit addressed the question
 4 of whether the phrase “the initial communication,” as used in 15 U.S.C. § 1692g(a), refers only to
 5 the very first communication sent about a debt, or instead to the first communication sent by each
 6 and every debt collector that seeks to collect the debt. 829 F.3d 1068 (9th Cir. 2016). The Ninth
 7 Circuit held that “the initial communication” applies to the latter scenario. Id. At 1078. It went on
 8 to note that “[v]iewing the text of § 1692g(a) in the context of the FDCPA as a whole makes clear
 9 that the validation notice requirement applies to each debt collector *that tries to collect a given*
 10 *debt.*” Id. (emphasis added). This holding and the plain language of the statute, including the
 11 statute’s allowance for more protective state laws, support this Court’s understanding of the
 12 FDCPA’s validation notice requirement as being triggered by communications made in the course
 13 of “tr[ying] to collect a given debt” – not communications that are merely informational, or made
 14 for the purposes of giving a consumer breathing room to verify the debt, prior to the actual
 15 commencement of collection efforts. Thus, one possible constitutional scenario would be one in
 16 which a Section 7 notice is sent to a consumer with all of the information set forth in SB 248,
 17 Section 7(1), along with an explicit statement that the collection agency does not intend to take
 18 any collection-related action within the 60-day period, and that once the 60-day period passes, the
 19 consumer’s rights under the FDCPA kick in. Such a notice would comply with both SB 248 and
 20 the FDCPA.

21 The Court further finds that SB 248 does not stand as an obstacle to the accomplishment
 22 of Congress’s objectives in passing the FDCPA. English, 496 U.S. 72, 78-80 (1990). The
 23 FDCPA’s declared purpose is to protect consumers from abusive debt collection practices.
 24 Hernandez, 829 F.3d at 1078. To that end, the “mini-Miranda” warning seeks to prohibit collection
 25 agencies from using “false, deceptive, or misleading representation or means in connection with
 26 the collection of any debt.” 15 U.S.C. § 1692e. Under no reasonable interpretation of SB 248 can
 27 it be said that the Section 7 notice interferes with this purpose. To the contrary, it bolsters the
 28 FDCPA’s core goal. The Section 7 notice creates a period within which *no representation* – let

1 alone a false, deceptive, or misleading representation – can be made to a debtor in connection with
 2 the collection of his or her debt. The Court finds that Congress's purpose in enacting the FDCPA
 3 is reasonably served by giving medical debtors a period of 60 days to verify or investigate their
 4 medical debt, undisturbed by the collection agency's attempts to initiate collections-related
 5 contact. Altria Grp., 555 U.S. at 76.

6 Plaintiffs contend that Defendant's representation that a Section 7 notice is merely
 7 informational and not made in connection with the collection of a debt is belied by Defendant's
 8 own behavior. In support of this argument, Plaintiffs produced numerous form letters, approved
 9 by the FID, that collections agencies intend to send consumers in order to comply with SB 248.
 10 These approved form letters set forth the requirements of SB 248, but also include the FDCPA's
 11 mini-Miranda and Validation Notice requirements. For instance, one approved form letter states:

12
 13 *This is a notification that [collection agency] will not make any actions to collect
 14 this debt within 60 days from the date of this letter. Any payments made toward the
 15 debt during this timeframe are considered voluntary and will not void the 60-day
 16 notification period described above. We will take no other action to collect this
 17 debt until 60 days from the date of this letter.*

18 . . .

19 *Unless you notify this office within 30 days after receiving this notice that you
 20 dispute the validity of this debt or any portion thereof, this office will assume this
 21 debt is valid. If you notify this office in writing within 30 days from receiving this
 22 notice, this office will obtain verification of the debt or obtain a copy of a judgment
 23 and mail you a copy of such judgment or verification.*

24 ECF No. 59-2. (emphasis added).

25 Another approved form letter reads:

26 Your medical debt with [creditor], for the service dates listed below, has been
 27 assigned to [collection agency] for collections.

28 *Please be advised that this is not a demand for payment nor is one due at this time.
 29 This is a notification that Healthcare Collections-I, LLC will not make any actions
 30 to collect this debt, and the debt will not be reported to a credit reporting agency,*

1 *within 60 days from the date of this letter.* Any payments made toward the debt
 2 during this timeframe are considered voluntary and will not void the 60 day
 3 notification period described above.

4 *Federal law requires the following notice: This correspondence is from a debt
 5 collector and is an attempt to collect a debt. Any information obtained will be used
 6 for that purpose.*

7 *Id.* (emphasis added).

8 Plaintiffs argue that by approving these form letters, Defendant has effectively conceded
 9 that a Section 7 notice is an “initial communication,” made “in connection with the collection of
 10 [a] debt,” thus triggering the FDCPA’s Validation Notice and “mini-Miranda” requirements.
 11 Plaintiffs further contend that these form letters create confusion for the consumer.

12 The Court rejects Plaintiffs’ reliance on these letters for a few reasons. First, the Court
 13 notes that this is a pre-enforcement facial challenge to the statute, rather than an as-applied
 14 challenge. Plaintiffs’ repeated reliance upon hypothetical enforcement scenarios and reference to
 15 unfinalized regulations or forms cannot serve as a basis upon which to invalidate the law at this
 16 juncture. See Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009) (stating
 17 that a “speculative, hypothetical possibility does not provide an adequate basis to sustain a facial
 18 challenge”).

19 Additionally, the Court finds that Plaintiffs’ reliance on these form letters is inappropriate
 20 as there is no indication that these form letters have been sent to any debtors in connection with
 21 the execution or enforcement of SB 248, and they were offered as drafts before the current
 22 proposed regulations were introduced. The proposed draft regulation, issued August 24, 2021,
 23 explicitly states that that Section 7 “is not intended to be a communication under the Fair Debt
 24 Collection Practices Act.” ECF No. 40-1. All of the approved form letters in the record predate
 25 August 24, 2021. The Court also notes that it has received no indication from the parties that the
 26 process for promulgating regulations has yet concluded. Thus, it cannot be said – based on the
 27 unsent form letters alone – that it is impossible to simultaneously comply with SB 248 and the
 28 FDCPA.

1 The Court also agrees with Defendant that SB 248 seeks to provide greater consumer
 2 protections, above and beyond the floor established by the FDCPA. As such, the FDCPA's savings
 3 clause is triggered, such that SB 248 can be construed to coexist with the federal law. The
 4 FDCPA's savings clause states, in pertinent part:

5 This subchapter does not annul, alter, or affect, or exempt any person subject to the
 6 provisions of this subchapter from complying with the laws of any State with
 7 respect to debt collection practices, except to the extent that those laws are
 8 inconsistent with any provision of this subchapter, and then only to the extent of
 9 the inconsistency. *For purposes of this section, a State law is not inconsistent with
 this subchapter if the protection such law affords any consumer is greater than the
 protection provided by this subchapter.*

10 15 U.S.C. § 1692n (emphasis added).

12 At the July 27 hearing, Plaintiffs' counsel argued that SB 248's 60-day notice could
 13 undermine consumer protections in two ways. First, to the extent there are any late fees accruing
 14 on the debt, extending payment by 60 days would only increase the debtor's late fees. Second, to
 15 the extent the creditor itself furnishes information regarding the debt to credit reporting agencies,
 16 the 60-day notice could interfere with the consumer's ability to dispute the debt. Plaintiffs' counsel
 17 also argued that the 60-day breathing period could make it difficult for consumers to receive
 18 answers from collection agencies regarding their debt.

19 The Court finds these arguments to be wholly speculative. Extending the time within which
 20 a collection agency may begin to collect a medical debt would not artificially increase the amount
 21 of late fees due on the debt; it would merely provide consumers with advanced notice of debt
 22 collection, and create a period in which the debt collector could not act as it otherwise would to
 23 initiate collection of the debt. A consumer is still free to begin making voluntary payments on the
 24 debt within the 60-day period, and to prevent the accrual of further late fees. See SB 248, Section
 25 7.5(1) ("Nothing in section 7 of this Act shall prohibit a collection agency from accepting a
 26 voluntary payment from a medical debtor during the 60-day notification period"). Further,
 27 there is nothing in the text of SB 248 to suggest that collection agencies may not answer debtors'
 28 questions regarding their underlying debt. Section 7.5, which sets forth certain parameters should

1 a debtor initiate the payment process with a collection agency, merely imposes affirmative
2 disclosure requirements on collection agencies, such as the duty to disclose that payment is not
3 demanded or due, and the duty to disclose that the debt will not be reported to any CRA in the 60-
4 day breathing period. Id. SB 248, by its terms, does not prohibit collection agencies from
5 answering debtors' questions in good faith, nor does it seek to harm consumers by barring such
6 communication.

7

8 C) FCRA Preemption

9 The Court next addresses Plaintiffs' FCRA preemption argument.

10 Congress enacted the FCRA to “ensure fair and accurate credit reporting, promote
11 efficiency in the banking system, and protect consumer privacy.” Gorman v. Wolpoff &
12 Abramson, LLP, 552 F.3d 1008, 1013 (9th Cir. 2009) (quotations and citations omitted). To those
13 ends, the FCRA seeks to make “consumer reporting agencies [“CRAs”] exercise their grave
14 responsibilities . . . with fairness, impartiality, and a respect for the consumer’s right to privacy.”
15 Id. (quoting 15 U.S.C. § 1681(a)(4)). In realizing that goal, FCRA “imposes some duties on the
16 sources that provide credit information to CRAs, called ‘furnishers’ in the statute.” Id. Common
17 “furnishers” of information include “credit card issuers, auto dealers, department and grocery
18 stores, lenders, utilities, insurers, collection agencies, and government agencies.” Id. at n.7
19 (quoting H.R. Rep. No. 108-263, at 24 (2003)).

20 Section 1681s-2 of FCRA imposes two categories of responsibilities on the furnishers of
21 information. Id. at 1014. The first category, set forth at subsection (a), covers the furnisher's duty
22 to "provide accurate information" to the CRA, by, *inter alia*: reporting knowledge of errors;
23 correcting and updating consumer information; providing notice of any dispute about the accuracy
24 of information furnished to the CRA; providing notice of voluntary closure of an account by the
25 consumer; providing notice of the delinquency of consumer accounts within 90 days of furnishing
26 the information; creating procedures to respond to notices from CRAs relating to identity theft;
27 and providing notice to the consumer of the furnishing of negative information to a CRA, within
28 30 days of the furnishing of a negative report. 15 U.S.C. § 1681s-2(a)(1)-(7).

1 The second category, set forth at subsection (b), includes various duties which are triggered
 2 only “upon notice of a dispute” – “that is, when a person who furnished information to a CRA
 3 receives notice from the CRA that the consumer disputes the information.” Gorman, 552 F.3d at
 4 1014. Under subsection (b), once a CRA notifies the furnisher that a consumer has lodged a dispute
 5 about the completeness or accuracy of information furnished to the CRA, the furnisher is required
 6 to investigate the dispute, as well as to take certain actions if an item of information is found to be
 7 inaccurate, incomplete, or unverifiable after investigation. 15 U.S.C. § 1681s-2(b)(1).

8 FCRA expressly preempts state laws that attempt to cover the subject matter regulated by
 9 § 1681s-2(a) and (b). See § 1681t(b)(1)(F). The relevant preemption clause states that “[n]o
 10 requirement or prohibition may be imposed under the laws of any State with respect to any subject
 11 matter under section 623 [15 U.S.C. § 1681s-2], relating to the responsibilities of persons who
 12 furnish information to consumer reporting agencies.” Id.

13 Plaintiffs argue that the preemption clause at § 1681t(b)(1)(F) expressly preempts SB 248,
 14 because SB 248 restricts the furnishing of information to CRAs. Plaintiffs contend that FCRA
 15 creates a comprehensive statutory scheme that imposes specific duties on the furnishers of
 16 information to CRAs, which is disrupted by SB 248. Plaintiffs argue that SB 248’s 60-day freeze
 17 prevents information from being “furnished in a timely manner to consumer reporting agencies,”
 18 thereby interfering with the ability of potential lenders and creditors to see the true status of a
 19 borrower’s credit history. Defendant responds that FCRA does not preempt SB 248, because while
 20 § 1681s-2 imposes certain duties upon furnishers to provide accurate information, it does not
 21 require that this duty be completed within any particular time period. Because it is possible for
 22 furnishers’ duties under § 1681s-2(a) and (b) to take hold *after* SB 248’s 60-day notice period has
 23 passed, Defendant argues that § 1681t(b)(1)(F) of FCRA does not preempt SB 248.

24 The Court finds that § 1681t(b)(1)(F) does not preempt SB 248. Beginning with the
 25 language of the preemption statute, Altria Grp., 555 U.S. at 76, it is clear that to the extent
 26 § 1681t(b)(1)(F) preempts state laws dealing with “the responsibilities of persons who furnish
 27 information to consumer reporting agencies,” it expressly does so only in relation to the very
 28 specific subject matter enumerated in 15 U.S.C. § 1681s-2. See § 1681t(b)(1)(F) (stating that “no

1 requirement or prohibition may be imposed under state law *with respect to any subject matter*
 2 *under . . . 15 U.S.C. § 1681s-2*” (emphasis added)). As noted above, § 1681s-2 sets forth certain
 3 requirements related to a furnisher’s duty to accurately report credit information, and to investigate
 4 any dispute about the accuracy of credit information reported to the CRA.

5 The Court agrees with Defendant that nothing in FCRA requires that the above-listed duties
 6 be completed during the 60-day notice period created by SB 248. FCRA does not impose a
 7 standard time period for credit reporting (as Plaintiffs themselves conceded at oral argument), let
 8 alone require that a medical debt be furnished to CRAs within Section 7’s 60-day breathing period.
 9 § 1681s-2 – which is the only section of FCRA that speaks to the responsibilities of furnishers –
 10 requires only that once consumer information *is* furnished, the furnisher take certain steps to ensure
 11 the information’s ongoing accuracy. Simply put, the timing of the *furnishing itself* is not an issue
 12 that § 1681s-2 of FCRA is concerned with. If Congress wanted to impose time requirements within
 13 which a furnisher must communicate a debt to a CRA, it could have done so. Such time
 14 requirements exist elsewhere in FCRA. See, e.g., 15 U.S.C. § 1681c(a)(4) (prohibiting CRAs from
 15 issuing consumer reports containing accounts placed for collection which precede the report by
 16 more than 7 years); 15 U.S.C. § 1681s-2(a)(7) (requiring furnishers to provide notice to the
 17 consumer of the furnishing of negative information to a CRA within 30 days of the furnishing of
 18 a negative report). Because Congress did not create a requirement that furnishers communicate a
 19 debt to a CRA within any particular period of time, despite having imposed time limits elsewhere
 20 in the law, the Court will not read FCRA to be in conflict with SB 248’s 60-day notice. See
 21 Robinson v. Shell Oil Co., 519 U.S. 337, 341-42 (1997) (declining to read a temporal qualifier into
 22 the statute where Congress could have so specified, but did not).

23 To the extent Plaintiffs contend that creditors will be prejudiced by a collection agency’s
 24 inability to furnish information to CRAs for 60 days, this is merely a hypothetical concern. First
 25 of all, Plaintiffs have not represented to the Court that collection agencies typically furnish
 26 information about a medical debt to CRAs within 60 days of making initial contact with the debtor.
 27 Napolitano, 558 F.3d at 866. Even in the absence of SB 248, there is no evidence that a collection
 28 agency will furnish information about a medical debt to a CRA within 60 days of initial contact,

1 as FCRA simply does not impose any such time requirement. Furthermore, the Court emphasizes
 2 that SB 248 only imposes a brief moratorium on when a *collection agency* may report a debt to a
 3 CRA – it does *not* restrict the lender (e.g. the hospital or medical provider) itself from furnishing
 4 the debtor’s information to a CRA. SB 248 does not stand in the way of a lender’s ability to report
 5 a debt. Because SB 248 does not “relat[e] to the responsibilities of persons who furnish information
 6 to [CRAs],” as specifically defined by 15 U.S.C. § 1681s-2, the Court cannot find that it was the
 7 “clear and manifest purpose of Congress” for FCRA to preempt SB 248 under § 1681t(b)(1)(F).
 8 Am. Bankers Ass’n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005).

9 The cases cited by Plaintiffs in support of their FCRA preemption argument are both non-
 10 binding and distinguishable. First, Plaintiffs rely on Royal v. Equifax, in which the district court
 11 for the Eastern District of California held that Plaintiffs’ state law claims were preempted by FCRA
 12 because FCRA “precludes all state statutory or common law causes of action that would impose
 13 any ‘requirement or prohibition’ on the furnishers of credit.” 405 F. Supp. 2d 1177, 1181 (E.D.
 14 Cal. 2005). While this language appears to sweep broadly, it does not pertain to the issue at hand.
 15 Plaintiffs in Royal alleged that their credit reports “contained grossly inaccurate credit
 16 information,” and that the debt collectors furnishing the information to CRAs failed to take
 17 ameliorative action, despite Plaintiffs’ numerous attempts to alert them to the errors. Id. at 1178.
 18 In determining that Plaintiffs’ state law claims were preempted by FCRA, the district court
 19 observed that Plaintiffs’ claims were “based on alleged injury *arising purely from the reporting of*
 20 *credit information by a furnisher of credit.*” Id. (emphasis added). Here, by contrast, Plaintiffs do
 21 not challenge any erroneous “reporting of credit information by a furnisher of credit”; instead, they
 22 challenge just the opposite – SB 248’s temporary *freeze* on the reporting of credit information.

23 Nor is the Court bound or persuaded by Consumer Data Industries, Association v. Frey,
 24 495 F. Supp. 3d 10 (D. Maine 2020). In Frey, the district court for the District of Maine held that
 25 FCRA preempted a state law which prohibited a CRA from publishing medical debt on a consumer
 26 report for at least 180 days from the date of the first delinquency on the debt. 495 F. Supp. 3d at
 27 20-21. In so holding, the Frey court focused on 15 U.S.C. § 1681t(b)(1)(E), which expressly
 28 preempts state law that touches on subject matter regulated under 15 U.S.C. § 1681c, “relating to

1 information contained in consumer reports.” § 1681c regulates the information that a CRA may
 2 include in a consumer report. It does not regulate the behavior of collection agencies, like Plaintiffs
 3 in this case, that are the furnishers of information *to* CRAs. And reciprocally, nothing in SB 248
 4 speaks to the information that a CRA may include in a consumer report; SB 248 is only concerned
 5 with imposing a temporary breathing period within which furnishers cannot provide information
 6 to CRAs. In short, Plaintiffs’ attempt to liken the 180-day freeze in *Frey* to the Section 7 notice is
 7 misguided, because the Maine law was concerned with the behavior of CRAs, and thus covered
 8 by § 1681c, whereas SB 248 is concerned with the actions of collection agencies and licensed debt
 9 collectors, which do not come within the ambit of § 1681c. While the *Frey* court determined that
 10 FCRA preempts any temporary freezes on the actions of CRAs, it said nothing about whether
 11 FCRA preempts temporary freezes on the actions of collection agencies.

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D) First Amendment

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Finally, the Court finds that Plaintiffs are unlikely to succeed on the merits of their First
 Amendment claim.

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Plaintiffs allege that SB 248 constitutes a prior restraint on constitutionally protected
 speech because it places a temporary freeze on Plaintiffs’ ability to communicate with medical
 debtors and CRAs. Plaintiffs assert that this restriction is a content-based restriction, subject to
 strict scrutiny, because it applies to particular speech, based on the topic discussed or the idea or
 message expressed.

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Defendant responds that the 60-day notice provision does not target speech, but instead is
 consistent with a state’s power to regulate the economic activity of debt collection. Defendant
 characterizes the 60-day freeze on communication as a restriction directed towards non-expressive
 economic activity, that carries with it only an incidental burden on speech. Defendant emphasizes
 that the 60-day notice is not a ban on communication, as nothing in Section 7 of SB 248 prohibits
 the debtor and the collection agency from (1) conversing regarding voluntary payments; or (2)
 conversing regarding errors that should be corrected. Instead, Defendant argues, the Section 7
 notice is designed only to regulate the economic activity of debt collection. Even if Section 7 could

1 be classified as speech regulation, Defendant argues, it is purely of private concern, because it is
 2 commercial speech solely related to the economic interests of collection agencies. Thus, if the
 3 Section 7 notice is construed to regulate speech, it should only trigger intermediate scrutiny, as it
 4 would only regulate commercial speech.

5 First, the Court finds that SB 248 regulates speech. While SB 248 pertains to “action[s] to
 6 collect a medical debt,” such actions plainly include efforts to communicate with debtors. The
 7 Court further finds, however, that the speech regulated is commercial speech, as it relates solely
 8 to the economic interests of debt collection agencies and their audience. Virginia Pharmacy Bd. v.
 9 Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). When determining whether the
 10 state has met its burden to justify a commercial speech regulation, courts evaluate: (1) whether the
 11 speech concerns lawful activity and is not misleading, (2) whether the asserted governmental
 12 interest justifying the regulation is substantial; (3) whether the regulation directly advances the
 13 governmental interest asserted; and (4) whether the regulation is more extensive than necessary to
 14 serve that interest.” Central Hudson Gas & Elec. Corp., 447 U.S. 557, 566 (1980); see also Retail
 15 Digital Network, LLC v. Prieto, 861 F.3d 839, 841-42 (9th Cir. 2017) (reaffirming the Central
 16 Hudson test for commercial speech restrictions).

17 Applying the Central Hudson test, the Court finds that Plaintiffs are unlikely to succeed on
 18 the merits of their First Amendment claim. Regarding the first factor, there is no dispute that
 19 collection agencies may lawfully contact a medical debtor regarding his or her debt. There is also
 20 little question that Nevada has a substantial interest in protecting its citizens from the financial ruin
 21 that may accompany crushing medical debt. Regarding the third factor – whether the regulation
 22 directly advances the governmental interest asserted – the Court finds that SB 248 advances the
 23 substantial governmental interest in easing Nevadans’ medical debt obligations and their attendant
 24 negative consequences by creating a breathing period for consumers to verify and challenge their
 25 debt. Finally, the Court finds that SB 248 is narrowly tailored to achieve that goal, as it creates
 26 only a brief carveout of time within which debt collectors may not initiate efforts to collect a debt,
 27 and the disclosure requirements imposed by Section 7.5 are neither onerous nor in conflict with
 28 federal law. In sum, SB 248 survives scrutiny under Central Hudson, and is not an unconstitutional

1 prior restraint on speech.

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3 *II. Risk of Irreparable Harm*

4 The Court next briefly addresses the second Winter factor – the likelihood that Plaintiffs
 5 will suffer irreparable harm in the absence of preliminary relief.

6 Plaintiffs argue that they face irreparable harm because SB 248 deprives them of their
 7 constitutional rights and forces them to choose between complying with state and federal law,
 8 thereby exposing them to financial liability. One of the Plaintiffs, PlusFour, Inc., alleges that it is
 9 on the brink of permanent closure, because it cannot engage in any medical debt collection in the
 10 state of Nevada due to the law's vagueness and its conflict with the FDCPA and the FCRA.
 11 Plaintiffs also allege that the medical debt collection industry in Nevada, writ large, has "ground
 12 to a halt because of S.B. 248."

13 Defendant responds that Plaintiffs have not shown a risk of irreparable harm, because
 14 economic harm is not irreparable harm for the purposes of imposing a TRO or PI. Defendant adds
 15 that Plaintiffs' allegations of permanent business closure and industry collapse are conclusory and
 16 unsupported by any evidence.

17 The Court finds that Plaintiffs have not met their burden to prove a risk of irreparable harm.
 18 As discussed above, the Court finds Plaintiffs unlikely to succeed on the claim that they have
 19 suffered constitutional violations. Further, loss of revenue or monetary harm in the form of
 20 damages is not sufficient to establish irreparable harm. Oakland Tribune, Inc. v. Chronicle Pub.
Co., Inc., 762 F.2d 1374, 1376 (9th Cir. 1985). While irreparable harm may be established by the
 21 threat of being driven out of business, Plaintiffs must do more than present affidavits containing
 22 conclusory allegations to demonstrate that the threat is actual and concrete. See Am. Passage, 750
 23 F.2d at 1473-74; see also Keywords, LLC. v. Internet Shopping Enters., No. 05-cv-2488-MMM,
 24 2005 U.S. Dist. LEXIS 51464, at *33 (C.D. Cal. June 29, 2005) (collecting cases and stating that
 25 Plaintiff's "conclusory assertion that defendants' conduct will drive it out of business does not
 26 adequately establish irreparable injury"). Plaintiffs have failed to meet that burden here. Myers'
 27 affidavit represents that based on his understanding, every member of his association has laid off
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1 or “not hired additional employees” due to the “industry-wide standstill in medical debt
2 collection.” These statements, standing alone, lack sufficient evidentiary support. Further, while
3 Bennett’s affidavit states that PlusFour has had to lay off its staff, there is no indication in the
4 record that PlusFour has been threatened with suit under either the FDCPA or SB 248. That
5 PlusFour has elected to preemptively cease debt collection and to lay off its staff is not sufficient
6 evidence upon which to base a finding of irreparable harm.

III. Balance of the Equities and Public Interest

9 The Court further finds that the balance of the equities and the public interest – the third
10 and fourth Winter factors – tip in Defendant's favor.

11 Plaintiffs allege that SB 248 imposes substantial hardship. They contend that the conflicts
12 between SB 248 and federal law place them “at risk of terminal regulatory discipline under NRS
13 Chapter 649” and civil liability under the FDCPA. Further, Plaintiffs argue that under NRS
14 § 649.435, they may be subject to criminal penalties if they choose to follow federal law instead
15 of SB 248. Plaintiffs contend that the public interest is served by enjoining the enforcement of an
16 unconstitutional law, and by enjoining preempted provisions of state law.

17 Defendant responds that Plaintiffs mischaracterize the law and offer no evidence that any
18 of their feared outcomes are likely to occur. Defendant acknowledges that collection agencies can
19 suffer criminal penalties for violating Chapter 649, but notes that the Ninth Circuit presumes state
20 criminal statutes carry a scienter requirement; because Plaintiffs would not meet the *mens rea*
21 requirement, they are in no danger of being subject to criminal prosecution. Further, Defendant
22 argues that Plaintiffs have not balanced their purported interests with the public's overwhelming
23 interest in protecting the large numbers of Nevadans who struggle with medical debt.

24 The Court finds that both the balance of the equities and the public interest favor Defendant.
25 Because the Court finds Plaintiffs unlikely to succeed on the merits of their preemption claims, it
26 does not agree with Plaintiffs that there is any risk of civil or criminal liability, as Plaintiffs can
27 comply with SB 248 and federal law simultaneously. Further, the Court finds that there is a
28 substantial public interest in permitting the state Legislature to respond to the medical debt crisis

1 in the context of the COVID-19 pandemic, and to pass lasting consumer protections for debtors in
2 the state of Nevada.

3 Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction
4 [ECF Nos. 4, 5] are accordingly DENIED.

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6 **VI. CONCLUSION**

7 **IT IS THEREFORE ORDERED** that Defendant's Motion to Strike [ECF No. 43] is
8 **DENIED**.

9 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Leave to Amend/Correct
10 Complaint [ECF No. 52] is **GRANTED**.

11 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Leave to Supplement and
12 Amend Application for Temporary Restraining Order and Motion for Preliminary Injunction [ECF
13 No. 53] is **GRANTED**.

14 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Temporary Restraining Order
15 and Motion for Preliminary Injunction [ECF Nos. 4, 5] are **DENIED**.

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17 **DATED: February 7, 2022**

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE